

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PERMA-FIX NORTHWEST RICHLAND,
INC., a Washington Corporation,

No. CV-06-5013-FVS

Plaintiff,

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGEMENT

v.

ECOLOGY SERVICES, INC., a foreign
corporation,

Defendant.

THIS MATTER came before the Court for a hearing, without oral argument, on Plaintiff's January 14, 2008 motion for summary judgment. (Ct. Rec. 43). Defendant's request for oral argument on Plaintiff's motion for summary judgment is denied pursuant to this Court's authority under Local Rule 7.1(h)(3). Plaintiff is represented by Diehl R. Rettig, and Defendant is represented by Richard D. Campbell, Steven K. Fedder, and Andrew L. Cole.

BACKGROUND

On July 1, 1998, ATG Richland Corporation ("ATG") entered into a contract with Ecology Services, Inc. ("ESI"). (Ct. Rec. 1 ¶ III).

1 Pursuant to the contract, ATG processed and disposed of waste for ESI,
2 and ATG invoiced ESI for the amount of \$1,171,190.12. Plaintiff
3 alleges that ESI still owes \$499,894.41 under the contract.¹

4 On December 3, 2001, ATG filed for bankruptcy. On February 6,
5 2006, the trustee assigned the contract to Pacific EcoSolutions, Inc.
6 ("Plaintiff")². On February 9, 2006, Plaintiff filed a complaint in
7 the United States District Court for the Eastern District of
8 Washington against ESI to recover the alleged outstanding balance of
9 the contract. (Ct. Rec. 1).

10 During discovery it was revealed that Plaintiff entered into a
11 contract with National Institutes of Health ("NIH") on October 2,
12 2006. Pursuant to this agreement, NIH agreed to pay Plaintiff
13 \$286,656.27 to process and dispose of "legacy waste." Based on the
14 discovery of this contract, the Court granted ESI's request to file a
15 counterclaim alleging that it is entitled to a return of all monies
16 for which Plaintiff received duplicate payments from NIH. (Ct. Rec.
17 137).

19 ¹Plaintiff initially alleged in its complaint and motion for
20 summary judgment that Plaintiff was entitled to an award of
21 \$589,257.51, plus interest. (Ct. Rec. 1 ¶ VI; Ct. Rec. 43).
22 However, Plaintiff's reply brief agrees that ESI's credit memo in
23 the amount of \$89,363.10 (Ct. Rec. 68, Ex. 2) was not accounted
24 for in its initial calculation. (Ct. Rec. 110 at 2). Plaintiff
concedes that the net principal balance due is \$499,894.41, not
\$589,257.51 as originally alleged, based on the credit memo
presented by ESI in its response. (Ct. Rec. 110).

25 ²On July 13, 2007, Pacific EcoSolutions, Inc., changed its
26 name to Perma-Fix Northwest Richland, Inc. (Ct. Rec. 41). For
purposes of this order, all references to Plaintiff shall refer
to both Pacific EcoSolutions, Inc., and Perma-Fix Northwest
Richland, Inc., as the entity is one in the same.

1 **DISCUSSION**

2 **I. PRELIMINARY MATTERS**

3 **A. Caption**

4 On January 14, 2008, Plaintiff moved the Court for an order
5 amending the case caption to change the name of Plaintiff from Pacific
6 EcoSolution, Inc. to Perma-Fix Northwest Richland, Inc. (Ct. Rec.
7 39).³ Plaintiff indicated that since the commencement of this action,
8 Plaintiff had undergone a name change and is now Perma-Fix Northwest
9 Richland, Inc. (Ct. Rec. 40). "An action must be prosecuted in the
10 name of the real party in interest." Fed. R. Civ. P. 17(a)(1). Other
11 than the change of name, Plaintiff remains the real party in interest.
12 The caption shall be amended to reflect the properly named Plaintiff
13 in this action, Perma-Fix Northwest Richland, Inc.

14 **B. Motion to Strike Affidavit**

15 On February 24, 2008, Defendant moved to strike the affidavit of
16 Diehl R. Rettig in support of Plaintiff's motion for summary judgment.
17 (Ct. Rec. 54). Defendant argued that Mr. Rettig lacked personal
18 knowledge of the documents propounded as exhibits to the affidavit and
19 the documents were otherwise inadmissible pursuant to Fed. R. Evid.
20 801. (Ct. Rec. 56). Nevertheless, Plaintiff's response to
21 Defendant's motion to strike provided declarations of the maker or
22

23 ³No response from ESI has been received by the Court with
24 respect to Plaintiff's motion to amend the caption. Local Rule
25 7.1(h)(5) holds that "[a] failure to timely file a memorandum of
26 points and authorities in support of or in opposition to any
motion may be considered by the Court as consent on the part of
the party failing to file such memorandum to the entry of an
Order adverse to the party in default."

1 recipient of each exhibit attached to the affidavit in question. (Ct.
2 Rec. 71-76). The Court finds that any error has been cured by the
3 supplemental declarations provided by Plaintiff. Defendant's motion
4 to strike is denied.

5 **II. SUMMARY JUDGMENT**

6 **A. Legal Standard**

7 Summary judgment is appropriate only if "there is no genuine
8 issue as to any material fact and . . . the moving party is entitled
9 to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A material
10 fact is one "that might affect the outcome of the suit under the
11 governing law[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248,
12 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A fact may be considered
13 disputed if the evidence is such that the fact-finder could find that
14 the fact either existed or did not exist. See *id.* at 249, 106 S.Ct.
15 at 2511 ("all that is required is that sufficient evidence supporting
16 the claimed factual dispute be shown to require a jury . . . to
17 resolve the parties' differing versions of the truth" (quoting *First*
18 *National Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89, 88
19 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968))).

20 Here, the facts upon which the Court relies are either undisputed
21 or established by evidence that permits but one conclusion concerning
22 the fact's existence.

23 **B. Breach of Contract - Nonpayment**

24 Pursuant to the July 1, 1998 Radioactive Waste Treatment,
25 Transportation, And Disposal Agreement For Exclusive Brokerage of
26 Wastes to ATG Richland Corporation (ATGRC) by Ecology Services, Inc.

1 ("contract"), ATG agreed to process and dispose hazardous/radioactive
2 waste provided by ESI, and ESI agreed to make payments to ATG for the
3 waste disposal service. (Ct. Rec. 46, Ex. 1). Plaintiff alleges that
4 ESI breached the contract by failing to make payments in the total
5 amount of \$499,894.41. Since Plaintiff has demonstrated that the
6 contract sued upon was executed by ESI, and its complaint alleged
7 there is an amount due and owing on the contract, Plaintiff has
8 established a prima facie case.

9 To establish a claim for breach of contract based upon
10 nonpayment, as alleged in the complaint, Plaintiff must merely plead
11 nonpayment. *West Coast Credit Corp. v. Pedersen*, 64 Wash.2d 33, 34-
12 36, 390 P.2d 551 (1964). The general rule is that the burden rests on
13 the defendant to prove payment, rather than on the plaintiff to prove
14 nonpayment. The person who pleads payment has the burden of proving
15 it; thus, in the absence of contrary evidence, it is presumed that
16 payment was not made. *See, Pedersen*, 64 Wash.2d at 35. ("[S]ince it
17 is extremely difficult if not impossible to prove nonpayment, a
18 negative, and relatively easy for the defendant to prove that he has
19 paid, the burden of proof should rest upon him"). "[T]he burden rests
20 upon the defendant to prove payment." *Pedersen*, 64 Wash.2d 33 at 35-
21 36 (citing *Hughes v. Wachter*, 61 N.D. 513, 238 N.W. 776 (1931)).
22 Accordingly, Plaintiff is not required to prove that there was
23 anything due and owing on the contract. Rather, ESI must show by a
24 preponderance of the evidence that payment, as promised, was provided
25 for the work ATG performed pursuant to the contract.

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1 **C. Analysis**

2 It is apparent that a material issue of fact exists as to the
3 amount due and owing and/or previously paid. Therefore, summary
4 judgment is not appropriate at this time.

5 ESI claims that it paid the invoices Plaintiff asserts are
6 outstanding. Although it appears, at this juncture, that ESI has
7 failed to demonstrate a total payment of the amount Plaintiff asserts
8 is owed, the total amount owed is not certain based on the present
9 state of the record. The issue of the amount owed on the contract is
10 a disputed issue of fact.

11 Plaintiff presents evidence in the form of the Garcia Summary
12 (Ct. Rec. 46, Ex. 2) which failed to account for the \$89,363.10 credit
13 memo (see n. 1, supra). ESI presents its internal "Cash Disbursements
14 Report" (Ct. Rec. 68, Ex. 1) which, although disputed by Plaintiff,
15 apparently reflects payments which are not set forth in either the
16 Garcia Summary or the ATG Accounting Statement. (Ct. Rec. 81 ¶¶ 39-
17 42). ESI additionally provided three cashed checks totaling
18 \$300,000.00. (Ct. Rec. 82, Ex. 3). Again, Plaintiff contests that
19 these checks change the amount allegedly due and owing.

20 As indicated in footnote one, above, Plaintiff agrees that its
21 initial calculation erroneously omitted ESI's credit memo in the
22 amount of \$89,363.10. (Ct. Rec. 110). It is difficult to discern
23 from the current record what else, if anything, may have been omitted
24 from Plaintiff's calculation. More information is needed for a proper
25 determination to be made. Plaintiff's request for summary judgment in
26 the amount of \$499,894.41, plus interest, is therefore denied.

1 Based on the foregoing, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's motion for summary judgment (**Ct. Rec. 43**) is
3 **DENIED.**

4 2. Defendant's request for oral argument on Plaintiff's motion
5 for summary judgment is **DENIED** pursuant to this Court's authority
6 under Local Rule 7.1(h)(3).

7 3. Plaintiff's motion to amend the caption (**Ct. Rec. 39**) is
8 **GRANTED.**

9 4. The District Court Executive shall **AMEND** the caption in this
10 case to change the name of Plaintiff from Pacific EcoSolutions, Inc.,
11 to Perma-Fix Northwest Richland, Inc. All future filings in this case
12 shall reflect the appropriate name of Plaintiff, Perma-Fix Northwest
13 Richland, Inc.

14 5. Defendant's motion to strike the affidavit of Diehl R. Rettig
15 in support of Plaintiff's motion for summary judgment (**Ct. Rec. 54**) is
16 **DENIED.**

17 6. Defendant's motion to shorten time for hearing on Defendant's
18 motion to Strike (**Ct. Rec. 57**) is **DENIED.**

19 **IT IS SO ORDERED.** The District Court Executive is hereby
20 directed to enter this order and furnish copies to counsel.

21 **DATED** this 28th day of August, 2008.

22 S/Fred Van Sickle
23 Fred Van Sickle
24 Senior United States District Judge
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